Supreme Court, U. S.
FILED
DEC 31 1980
MICHAEL RODAK, JR., CLERK

80-1100

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MARRIOTT CORPORATION, et al.,

Petitioners,

vs.

BETHLEHEM STEEL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether admiralty law of the United States with respect to maritime torts as enunciated by decisions of this Court establishes an "overriding domestic policy translated into law," Black Diamond S.S. Corp. v. Robert Stewart & Sons (Norwalk Victory), 336 U.S. 386 (1949), by reason of which vessels detained due to admittedly negligent obstruction of a foreign navigable channel are entitled to recovery of economic losses consisting of liquidated damages.

2. Whether, in light of the conflicting decisions of the Court of Appeals for the Second Circuit in Federal Commerce & Nav. Co., v. The M/V Marathonian, 528 F.2d 907 (2d Cir. 1975), cert. denied, 425 U.S. 975 (1976), and the Court of Appeals for

the Fourth Circuit in Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978), this Court should review and clarify its decision rendered 53 years ago in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

LIST OF PARTIES

Marriott Corporation, through its division, Sunline Agencies, and Oceanic Sunline Special Shipping Company

Weyerhaeuser Company, through its division, Weyerhaeuser Line

A/S Rederiet Odfjell

Polski Linie Ocaniczne

Naviera Alcala, S.A.

Matthew Shipping Company Limited and Matthew Ship Chartering Limited

I. S. Joseph Shipping Co., Ltd.

Manchester Liners, Inc.

Naviera Ceresio S.A.

Scindia Steam Navigation, Ltd.

Federal Commerce and Navigation [1974] [Ltd.]

Skips A/S Westray

Hyman-Michaels Company

Jadranska Slobodna Plovidba

Ocean Transport, Inc.

Kommanditgesellschaft Great Lakes Transcaribbean Line G.M.B.H. and Co.

Richmond Shipping Limited and Cast Shipping Limited

Luria Brothers & Company, Inc.

Murmansk Shipping Company

Black Sea Shipping Company

Kurt Orban Company, Inc.

Parcel Tankers, Inc.

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Petitioners, Marriott Corporation, et al., respectfully pray that a writ of certiorari issue to review the portion of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit relating to the appeal of such Petitioners in that Court.

OPINIONS BELOW

Memorandum and Order of the District Court entered October 20, 1977 is published at 449 F.Supp. 681 (1977) (Appendix B). The opinion of the Court of Appeals decided and filed October 2, 1980 (Appendix A) has not been reported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was decided and entered on October 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This case involves damages to Petitioners resulting from an accident in the Welland Canal caused by Respondent's vessel during 1974. The steamer Steelton struck a bridge and obstructed the canal for approximately two weeks thus detain-

ing Petitioners' vessels.

In denying recovery of detention damages of $1,433,791.11 sustained by thirty six vessels against an admitted tort-feasor, and concluding that the domestic policy of the United States does not permit recovery of economic loss in the absence of physical injury, the Sixth Circuit has ignored well established law of maritime torts as clarified by recent decisions of this Court specifically holding that there may be such recovery of economic loss in maritime claims. Moragne v. States Marine Lines, 398 U.S. 375 (1970); Sea-Land Services, Inc. v. Gaudet, Adm'rx., 414 U.S. 573 (1974); American Export Lines, Inc. v. Alvez, 100 S.Ct. 1673 (1980). Thus, the Sixth Circuit has decided an important question of federal maritime law which has not been, but should be, settled by

this Court.

Moreover, the Sixth Circuit ignored its own decision specifically allowing the right to recovery of purely economic loss. National Steel Corp. v. Great Lakes Towing Co., 574 F.2d 339 (6th Cir. 1978).

The Sixth Circuit further refused to consider or even comment upon the issue raised in conflicting decisions of the Second and Fourth Circuits with respect to rights regarding vessel owners and charterers to recover such losses. Federal Commerce & Nav. Co. v. The M/V Marathonian, 528 F.2d 907 (2d Cir. 1975), cert. denied, 425 U.S. 975 (1976); Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978). As stated by the Second Circuit,

> "the Supreme Court should retain the exclusive privilege of overruling its own decisions,

> save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." 528 F.2d at 908.

Such certainty was created by the Fourth Circuit's holding that either the owner or the charterer, but not both, may recover.

This case provides the occasion for pronouncement of the doom.

Facts of the Case

On August 25, 1974, the steamer Steelton, owned and operated by Bethlehem Steel Corporation, en route from Lake Erie to Lake Ontario, collided with a highway bridge which spanned the Welland Canal. The Welland Canal lies wholly within the territorial boundaries of Canada and is the only means of passage between the two lakes. The bridge, owned by the St. Lawrence Seaway Authority, was

extensively damaged and the canal was completely blocked for approximately two weeks. Petitioners are owners and/or charterers of vessels which were detained by reason of the obstruction of the Welland Canal. The conduct of the Steelton's navigation is admitted by Bethlehem to have been negligent.

Shortly after the collision, Bethlehem filed an action in the Federal Court of Canada for limitation of liability under Canadian law and the Canadian court subsequently entered an order limiting Bethlehem's liability.

Separate actions were commenced against Bethlehem in the District Court for the Northern District of Ohio whereupon Bethlehem filed a complaint in the Northern District of Ohio admitting fault as to the conduct of the navigation of the Steelton, a vessel registered

and documented under United States law, and seeking limitation of its liability pursuant to Title 46 U.S.C. §§183-185 and Supplemental Rule (F) for certain admiralty and maritime claims of the Federal Rules of Civil Procedure.

In due course, all Petitioners filed claims in the limitation proceedings contesting Bethlehem's right to limit the amount of its liability pursuant to said statutes and rule. The total claims filed in the two actions were far in excess of the amount available for their satisfaction under the limitation provisions of either Canadian or American law.

During the pendency of the action in the Northern District of Ohio, the Canadian trial court entered a judgment dismissing all detention claims filed in that court. The judge of the Canadian

court held that, under Canadian law, where a claim is only for economic loss with no actual physical injury to the claimant, damages generally are not recoverable even where the prerequisites of foreseeability and a causal relationship are met. Concluding that the ruling of the Canadian court stated the controlling law of Canada, the District Court held there could be no recovery for economic loss resulting from detention of the vessels under the doctrine of lex loci delicti commissi and summarily dismissed all of Petitioners' claims.

Proceedings Below

On appeal to the Sixth Circuit, Petitioners raised two major questions now being presented to this Court by this Petition For Writ of Certiorari. Both directly involve prior decisions of this Court.

In Black Diamond S.S. Corp. v. Robert Stewart & Sons (Norwalk Victory), 336 U.S. 386 (1949), this Court set forth the generally accepted principle of application of lex loci delicti commissi with the specific qualification that the doctrine should be considered only "in the absence of some overriding domestic policy translated into law." Petitioners contended that the exception thereby carved out by this Court in Norwalk Victory was particularly applicable and that it was just the type of inequity produced by the decision of the Canadian court which prompted this Court in Norwalk Victory to qualify application of the doctrine where an overriding domestic policy translated into law existed.

Even though the Sixth Circuit acknowledged that there is no absolute

rule in the United States which forbids recovery of economic loss where the claimant has suffered no physical injury, that court concluded there is no over-riding domestic policy translated into law. That conclusion completely ignores recent decisions rendered by this Court establishing such a domestic policy.

The second question raised involves this Court's decision rendered some 53 years ago in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927), holding in essence that a vessel owner is entitled to recovery of loss of use when detained by negligence but that the right to such recovery does not extend to a vessel charterer even though the charterer may have been required to pay charter hire to the owner during the detention period. In the light of modern maritime commerce and the almost

universal use of various types of charters in the operation of vessels in every aspect of the maritime community, recent decisions have questioned application of the rule enunciated in Robins Dry Dock & Repair Co. v. Flint, supra. In Federal Commerce & Nav. Co. v. The M/V Marathonian, supra, the Court of Appeals for the Second Circuit challenged the wisdom of the rule in today's commercial atmosphere but stated that it was up to this Court to determine whether the rule should be changed. More recently, the Fourth Circuit in Venore Transp. Co. v. M/V Struma, supra, concluded that the Robins rule was not applicable if the charterer was obligated to continue payment of charter hire to the owner and recovery by the charterer constituted the same loss which would have been recovered by the

vessel owner but for the existence of the charter. Even though the Sixth Circuit was requested to render a decision with respect to the Robins ruling since many of the Petitioners' claims are on behalf of charterers, the Sixth Circuit completely ignored the issue in its opinion.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

Both questions raised by the Petition directly involve clarification of this Court's earlier decisions rendered 31 and 53 years ago. This Court is requested to review and interpret those two decisions in the light of its own pronouncements relating to modern legal and social philosophies as applied to the responsibilities of a maritime tort-feasor for the direct consequences of its acknowledged fault.

In each instance the issues are far-reaching in that they have a direct and immediate bearing on all maritime commerce conducted under the protection, guidance and dictates of the laws of the United States as pronounced and interpreted by this Court.

This Court long has been the guardian of federal questions raised under the General Admiralty and Maritime Law and very recently has rendered several decisions, each bearing upon Petitioners' rights to recover damages sustained by reason of Respondent's negligence. In the latest of those decisions, American Export Lines, Inc. v. Alvez, supra, it was observed that principles of maritime law prevalent as late as 1963 militated against, rather than supported, the issue of purely economic loss involved in that decision.

The two cases which this Court now is asked to review under modern law preceded that date by many years.

Furthermore, this writ should be granted because the questions raised fall specifically within the provisions of Rule 17 of the Rules of this Court setting forth Considerations Governing Review on Certiorari. With respect to the first question, the Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided that question in a way in conflict with applicable decisions of this Court. As to the second question, the Sixth Circuit ignored decisions of the Second and Fourth Circuits which are in conflict with each other on the same matter.

Clearly, there are special and important reasons for granting this writ.

Question 1.

When the District Court summarily dismissed Petitioners' claims on the basis of the decision of the Canadian Federal Court relying solely on the doctrine lex loci delicti commissi, that court brought into focus the significance, intent and meaning of the limitation imposed by this Court that the doctrine should be applied only "in the absence of some overriding domestic policy translated into law." Clearly this Court intended to qualify application of that doctrine and recognized that exceptions existed which would warrant refusal to apply the law of the place of the occurrence under pertinent and proper circumstances.

Petitioners now request this Court to express its views on the meaning of that specific limitation as applied to its recent pronouncements with respect to recovery of economic losses in maritime torts under circumstances where no physical injury was sustained by the party entitled to recovery.

Supreme Court Decisions

In 1970, Moragne v. States Marine Lines, supra, set the stage by allowing recovery under the general maritime law by a widow for her economic loss sustained as a consequence of the death of her husband.

Four years later in Sea-Land Services, Inc. v. Gaudet, Adm'rx., supra, this Court expanded upon the Moragne decision by granting a maritime right of recovery of economic losses to a decedent's family for their loss of support, services and society, expanding upon the term

"society" as embracing

> "a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." 414 U.S. at 585.

Most recently, in American Export Lines v. Alvez, supra, decided May 12, 1980, this Court extended those rights to apply to economic losses measuring a widow's loss of consortium. The principle to be followed in determining the right to recover economic loss was stated by this Court on p. 1677 as follows:

> "But it is a settled canon of maritime jurisprudence that 'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'"

As noted earlier, the Sixth Circuit stated specifically on p. 13 of its opinion (Appendix A) that there is no

absolute rule in the United States which forbids recovery for economic loss where the claimant has suffered no physical injury.

The decision of this Court in Lauritzen v. Larsen, 345 U.S. 571 (1953) has a most significant bearing on the issue now presented in that this Court considered at length the several factors with respect to choice of law governing a maritime tort claim, stating on p. 584 that:

> "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag."

Other Authorities

An erroneous conclusion upon which the Sixth Circuit in part based its decision is the assertion contained on p. 14 of the opinion (Appendix A) that the duty owed to Petitioners is the same

as that owed to the public in general. Such simply is not the case. In the course of maritime commerce generally, vessels are restricted in their navigation to channels and an unlawful obstruction created negligently, directly and foreseeably affects all navigation in that channel different than it does the public at large. Specifically in this case, Petitioners' vessels were foreclosed from proceeding in any alternative manner whereas members of the public who relied upon use of the bridge for whatever reason were afforded the opportunity of adopting alternative measures during the period the canal was obstructed. Three decisions of other courts clearly establish a right to recovery of loss of use under such circumstances. They are: Gartland S.S. Co. v. Elgin, Joliet

and Eastern Ry. Co., 277 F.2d 382 (7th Cir. 1960); In Re Lyra Shipping Co., 360 F.Supp. 1188, (E.D. La. 1973); In Re China Union Lines, Ltd., 285 F.Supp. 426 (S.D. Tex. 1967).

Arguments with respect to remoteness and foreseeability were relied upon in both the District Court and the Sixth Circuit. Those arguments clearly are inapplicable not only as shown by the above cases but also by the decision of the Court of Appeals for the Ninth Circuit in Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), where recovery of economic loss was awarded to commercial fishermen based upon negligent interference of their rights to earn a living due to an oil spill, holding that the loss of a prospective economic advantage presented a sufficient basis for recovery under the

law of negligence. That court noted on p. 561 that "an injury to maritime vessels and an interference with their right of navigation...constituted a maritime tort cognizable in admiralty."

The Sixth Circuit in its own decision in National Steel Corp. v. Great Lakes Towing Co., supra, allowed recovery of economic losses to a steel plant deprived of the use of its plant as a result of defendants' negligently damaging a railroad bridge used by the steel plant in the conduct of its business. Certainly on the subject of remoteness, recovery of that loss is at least one step removed from loss directly sustained by Petitioners herein. As previously stated, the opinion of the Sixth Circuit in this case ignored its own National Steel decision

rendered only two years ago.

To foreclose the issue of remoteness and foreseeability completely in the present case, reference need only be made to the Sixth Circuit's language on p. 4 of its opinion (Appendix A) that the Canadian court denied recovery "even where the injury might have been foreseeable and a proper causal relationship between the act and injury exist," a specific finding by the Canadian court in its opinion as to this case.

Finally, in response to any argument which may be made that the recent decisions of this Court apply only to personal injuries as distinguished from physical injuries in general, the observations of Gilmore and Black in their treatise The Law of Admiralty (2d ed. 1975) at p. 29 are most apropos:

"if there is any sense at all in having a separate basis for admiralty jurisdiction in the federal courts, it must be because there is a federal interest that can best be implemented by thus dealing with the major concerns of the shipping industry - with all of them, and not just with a few of them selected on antiquarian criteria."

Question 2.

It should be noted at the outset that in this instance some of Petitioners are vessel owners but the greater number are charterers. Thus the rights of all of Petitioners are involved in the first question whereas only those of vessel charterers are concerned in the issue raised with respect to this question relating to Robins Dry Dock & Repair Co. v. Flint, supra.

Over the years, courts and legal scholars have questioned the wisdom of

extending the ruling of this Court in Robins to circumstances beyond the specific facts of the case. That case involved a breach of contract claim by a vessel charterer against a drydock company. Briefly, recovery of loss of use sustained by the vessel by reason of drydock delay due to breach of contract was denied primarily on the theory that the contract between the vessel owner and the drydock was not for the charterer's benefit. The rationale of that decision has been extended by lower courts to include all claims by charterers for loss of charter hire whether based upon contract or tort.

This action, however, is founded upon an acknowledged maritime tort so that any contractual arrangements existing between vessel owner and

charterer should have no bearing upon the issue of the charterer's rights to recover actual out-of-pocket losses directly attributable to the Steelton's negligent navigation.

In the years since Robins was decided by this Court, there have been substantial changes in the conduct of maritime commerce on the Great Lakes and other navigable waters of the United States. Specifically, since opening of the St. Lawrence Seaway in 1959, ocean going vessels have been introduced into Great Lakes commerce in large numbers. For the most part these vessels are under a charter of one form or another, a fact which is common knowledge. Consequently, a tortious wrongdoer is charged with knowledge that its negligent conduct will result in damage to vessel charterers as well as owners.

While denying recovery of charter hire loss to a charterer in Federal Commerce & Nav. Co. v. The M/V Marathonian, supra, on the theory established by this Court in Robins, the Second Circuit challenged the validity of its own decision based simply on the fact that the party sustaining the loss was a charterer rather than a vessel owner reasoning, as previously noted, that this Court should retain the exclusive privilege of overruling its own decision.

In Venore Transp. Co. v. M/V Struma, supra, the Fourth Circuit adopted the very sensible rationale that a charterer required by the terms of the charter to continue payment of charter hire during the detention period was, in fact, the only party entitled to recovery since the owner, having re-

ceived full payment, had sustained no loss. The clear-cut distinction from Robins was that the charterer had not paid charter hire for the period during which the vessel was out of service. By adopting the most reasonable approach, that the mere fact the charter party has transferred the risk of loss of use from the owner to the charterer should not extinguish the right to recovery of a traditional item of damages, the Fourth Circuit allowed recovery to the charterer. Petitioners request this Court only to confirm the language of the Fourth Circuit that, when there has been no suspension in payment of charter hire during the period when the vessel is detained, the charterer who has paid the charter hire is entitled to recover what the owner would have been entitled to recover had those payments been suspended.

Such a conclusion is only a sensible and practical result and exposes the wrongdoer only to the requirement of responding to losses directly sustained by reason of its tortious conduct.

Furthermore, the reason and necessity for this Court's review of Robins at this time is exemplified by the inequitable situation presented by the diametrical results in Venore and the present case. In Venore, the company involved was a wholly owned subsidiary of Respondent herein and, in fact, the case was argued in the Fourth Circuit by Bethlehem's corporate counsel. Thus, in Venore, Bethlehem was in the position of asserting a charterer's right to recover and succeeded in doing so, whereas in these proceedings Bethlehem opposes such a right of

recovery. The contradiction so presented, by itself, should constitute a compelling inducement for this Court's review and clarification of Robins.

CONCLUSION

The Petition For Writ of Certiorari should be granted to re-examine and interpret the Norwalk Victory and Robins decisions in the general interest of the maritime community in conformity with this Court's recent pronouncements as to the scope and application of responsibilities in maritime torts. Specifically, it is essential to establish a uniform rule of law with respect to the right of vessels to recover detention damages in the absence of physical injury. The admiralty rule is that damages for detention are recoverable in collision cases. There is no viable

reason why they should not be equally recoverable in the absence of physical injury. Similarly, there should be no such distinction as between charterer and owner simply because of the existence of a charter.

For the foregoing reasons, Petitioners' Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing Petition For Writ of Certiorari and Appendix was made upon Respondent Bethlehem Steel Corporation, by delivering three (3) copies thereof to Lucian Y. Ray, Esq. and John H. Hanninen, Esq., Ray, Robinson, Hanninen and Carle, counsel of record, at their offices, 1050 Union Commerce Building, Cleveland, Ohio 44115, this 31st day of December, 1980; and that all parties required to be served thus have been served.

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PETITIONERS' APPENDIX

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APPENDIX A

No. 78-3137
No. 78-3138

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN THE MATTER OF THE COMPLAINT OF BETHLEHEM STEEL CORPORATION, ETC. BETHLEHEM STEEL CORPORATION, *Plaintiff-Appellee-Cross-Appellant,* v. MARRIOTT CORPORATION, ET AL., *Claimants-Appellants-Cross-Appellees.*	APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed October 2, 1980.

Before: EDWARDS, Chief Judge; LIVELY and ENGEL, Circuit Judges.

LIVELY, Circuit Judge. This admiralty case presents several issues related to limitation of liability[1] which have not been decided previously by this court.

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[1] Virtually all maritime nations have provisions whereby shipowners are able to limit their liability for losses occasioned by the operation of their vessels. A concise history of limitation of liability under American law is contained in Chief Justice Taft's opinion in *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207, 214-18 (1927).

I.

The Steelton, a Great Lakes steamship owned by the plaintiff Bethlehem, collided with a highway bridge which spanned the Welland Canal. The Welland Canal lies wholly within the territorial boundaries of Canada. The bridge, owned by the St. Lawrence Seaway Authority, was extensively damaged and the canal was completely blocked for approximately two weeks. A number of ships were required to interrupt their voyages and stand by until the canal was cleared. Shortly after the collision Bethlehem filed an action in the Federal Court of Canada for limitation of liability under Canadian law, naming as defendants the Seaway Authority "and all other persons having claims against the plaintiff, its ship 'Steelton' or the fund hereby to be created." The Canadian court entered an order limiting liability to $671,489 (Canadian), plus interest to date of deposit. Bethlehem deposited with the Canadian court $680,733, including interest ($691,761 (U.S.)). The Canadian court stayed all further proceedings arising out of the collision and entered a notice with provision for publication, requiring all persons who claimed damage from the collision to file their claims with that court.

A number of actions asserting claims arising out of the Steelton incident were filed against Bethlehem in the United States District Court for the Northern District of Ohio. Thereafter Bethlehem filed the present action in that court petitioning for limitation of liability under 46 U.S.C. § 183[2] while

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[2] § 183. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of chapter 8 of title 46 of the Revised Statutes and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefore, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be

claiming the benefit of the lesser limitation provided by the Canada Shipping Act.[3] The district court then ordered all persons claiming damage from the Steelton incident to file claims with it, and enjoined the institution and prosecution of any actions arising from the incident, except the instant proceeding and the one already pending in the Federal Court of Canada. The total claims filed in the two actions were far in excess of the amount available for their satisfaction under the limitation provisions of either Canadian law or 46 U.S.C. § 183.

II.

A.

The district court recognized the general rule that the right to recover for a tort is governed by the law of the place where the tort occurred. At the same time, the court recognized that the law of the forum determines procedural matters. Thus, the district court convened a hearing to determine whether the Canadian limitation law is substantive or procedural. Both Bethlehem and the claimants produced expert witnesses, Canadian attorneys, who agreed that there are no Canadian cases which define the nature of the limitation law. However, the experts disagreed in their opinions on the nature of the law, Bethlehem's witness proclaiming it substantive and the claimants' witness labeling it procedural.

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appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

[3] Whereas the Canadian law limits liability to a stated amount per ton, 46 U.S.C. § 183 provides that liability of the owner of the vessel "shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." The Steelton had no cargo, and Bethlemen filed an *ad interim* stipulation for value of the ship in the amount of $850,000.

After considering the expert testimony and several English decisions, the district court concluded that "the limitation of liability provisions of the Canada Shipping Act are procedural and do not attach to the rights created by that Act." Thus, the court held that 46 U.S.C. § 183, the law of the forum, determines the maximum limitation of the fund created in this action. The effect of this ruling was to set Bethlehem's potential liability at $850,000 rather than $691,000. This is the holding from which Bethlehem has filed its cross-appeal.

B.

The judgment was first appealed by a group of shipowners and charterers whose claims were dismissed by the district court. The claimants, of which Marriott Corporation is one, are owners and charterers of vessels which were detained by reason of the obstruction of the Welland Canal following the Steelton's collision with the bridge. During the pendency of the district court action, the Canadian trial court entered a judgment dismissing all claims filed in that court based on detention of vessels. The judge of that court, Justice Addy, found that under Canadian law when a claim is only for economic loss, with no actual physical injury to the claimant, damages are generally not recoverable even where the injury might have been foreseeable and a proper causal relationship between act and injury exists. A case from the Supreme Court of Canada, *Rivtow Marine Ltd.* v. *Washington Iron Works*, [1974] S.C.R. 1189, [1973] 6 W.W.R. 692, was distinguished on the ground that "a proximity of relationship giving rise to a duty to warn" justified an award of damages for economic loss unaccompanied by physical injury in that products liability case. Concluding that the ruling of Justice Addy in a case involving the identical facts and legal issue presented in the instant case stated the controlling law of Canada, the district court held there could be no recovery for eco-

nomic loss resulting from vessel delay. This holding presents the second issue for determination on this appeal.[4]

III.

In *Ocean Steam Navigation Co.* v. *Mellor* (The Titanic), 233 U.S. 718 (1914), the primary question was whether the owner of a foreign ship may limit its liability for losses on the high seas by resort to the courts of the United States. The Supreme Court held that when a foreign ship is sued in the courts of this country it may invoke limitation under U.S. law. This is so even though the foundation for recovery is a British tort and under the circumstances of the case the ship in not subject to the substantive law of the United States.

Lower court decisions following *Titanic* have concluded that limitation of liability statutes relate to remedy rather than to liability or the right to recover. *E.g., Royal Mail Steam Packet Co.* v. *Companhia de Navegaco Lloyd Brasileiro*, 31 F.2d 757 (E.D.N.Y. 1928), *aff'd*, 55 F.2d 1082 (2d Cir.), *cert. denied*, 287 U.S. 607 (1932); *The Mando*, 102 F.2d 459 (2d Cir. 1939). The Supreme Court cast some doubt on the accepted rule of *The Titanic* in *Black Diamond Steamship Corp.* v. *Robert Stewart & Sons, Ltd.* (Norwalk Victory), 336 U.S. 386 (1949). In that case the only issue decided was the amount of bond required to be posted in the United States district court by the shipowner seeking to limit its liability for losses which occurred in foreign waters. The plaintiff sought limitation under the Brussels Convention and tendered a bond which would have satisfied the requirements of the Convention. The district court dismissed the action for failure to post the larger bond required by the American limitation statute. The Supreme Court reversed and remanded with di-

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[4] We consider the issues in the same order they were decided by the district court. This order of proceeding is required by the Supreme Court's opinion in *Black Diamond Steamship Corp.* v. *Robert Stewart & Sons, Ltd.* (Norwalk Victory), 336 U.S. 386, 397-98 (1949).

rections to set aside the dismissal and make a determination of which limitation provision to apply. The Court also required the plaintiff to post the larger American bond to preserve the *status quo* pending appeal from the district court's ultimate decision. *Norwalk Victory* recognizes that the limitation statute of the forum does not always apply – contrary to the assumption of a number of courts following *The Titanic*. In looking at "the question whether there are any circumstances under which the Belgian limitation would be enforceable by our courts," the Supreme Court stated, ". . . if, indeed, the Belgian limitation attaches to the right, then nothing in *The Titanic*, 233 U.S. 718, stands in the way of observing that limitation." 336 U.S. at 395.

In *Norwalk Victory*, Justice Frankfurter did not disagree with the rule of *The Titanic*. He noted that the Court was dealing in that case with "a liability assumed already to exist on other grounds." *Id.* On the other hand, the district court in *Norwalk Victory* dismissed on the assumption that the law of the forum controlled because limitation laws are always procedural. Upon remand the district court was to determine "if it is the law of Belguim that the wrong creates no greater liability than that recognized by the Convention . . . ." *Id.* In other words, an American court may not assume that a foreign limitation of liability act is procedural. It must make a determination whether an independent basis of liability exists or whether under that nation's law "the wrong creates no greater liability than that recognized . . ." by the limitation act. If the *right* to recover is coextensive with the limitation on *amount* of recovery, then a limitation act is substantive and must be enforced by the forum. Viewed in this light *Norwalk Victory* does not represent a departure from the doctrine of *The Titanic*. Rather, it commands an inquiry into the nature of a foreign limitation act where it may not be assumed that liability already exists on other grounds.

In *Kloeckner Reederei Und Kohlenhandel G.M.B.H.* v. *A/S Hakedal* (The Western Farmer), 210 F.2d 754, 757 (2d Cir.

1954), Judge Learned Hand wrote, "*The Titanic* . . . finally settled it for us that such statutes [limitation acts] are part of the remedy, and that the law of the forum applies." He found nothing in *Norwalk Victory* which qualified this rule. Implicit in the holding is the assumption that liability for the tort existed on other grounds.

In *Petition of Chadade Steamship Co.* (The Yarmouth Castle), 266 F.Supp. 517 (S.D. Fla. 1967), the Panamanian owner of a cruise ship which burned and sank on the high seas petitioned a United States court for limitation of liability. The district court followed the procedure directed by the Court in *Norwalk Victory* and received expert testimony on the nature of the Panamanian limitation law. The court stated its conclusion as follows:

> The limitation of liability contained in the Panamanian law is substantive rather than procedural and attaches specifically to the right. 266 F.Supp. at 522.

Perceiving no overriding public policy of the United States which precludes doing so, the court applied the limitation provision of the law of Panama. The court in *Complaint of Ta Chi Navigation (Panama) Corp. S.A.*, 416 F.Supp. 371 (S.D. N.Y. 1976), refused to follow *The Yarmouth Castle*, applied the limitations provision of the United States rather than the Panamanian limitation provision, and held that the decision in *The Titanic* "still is the controlling law in the instant case." *Id.* at 377.

It is not surprising that the cases have produced different results. *The Titanic* concerned a disaster on the high seas. *Norwalk Victory*, on the other hand, dealt with a collision in Belgian territorial waters. One case involved great loss of life, the other only property damage. In some cases the parties seeking to limit their liability have been insurers rather than shipowners. *See Complaint of Ta Chi Navigation, supra*, 416 F. Supp. at 379. In a field as complex as maritime tort law

the choice-of-law problems are difficult, and the circumstances of each case determine the ultimate choices which the courts make. *See M. Hancock, Torts in the Conflict of Laws*, Ch. IX (1942).

The district judge in the present case followed the command of the Court in *Norwalk Victory*. Judge Krupansky received the testimony of Canadian lawyers and found the expert witness of the claimants the more persuasive. This witness stated his opinion that "the fixing of the amount or value of the Steelton's owner's limitation of liability is a matter of procedure and not a matter of substance." He stated that the Canadian limitation act provides for a "quantification" of damages, that it merely provides a procedural remedy for scaling down claims to the proportionate share of a limited fund. The witness supported his testimony with references to several English and Canadian decisions dealing with damages.

This court accepts the district court's conclusion that the Canadian limitation statute is procedural. This conclusion is supported by competent testimony. Furthermore, it represents a desirable choice-of-laws decision. The Steelton is an American ship. The parties who will be affected by this limitation decision chose to sue the Steelton's owner in a court of the United States rather than a court of Canada. Though the collision occurred in Canadian waters, insofar as the limitation between the present parties is concerned, the interest of the United States in applying its own legislatively determined concept of limitation is stronger than that of Canada. This appears to be a proper case for application of the law of the forum.

IV.

The second issue concerns not the amount, but the right of the claimants to recover. The right to recover damages is a matter of substantive law which is controlled by Canadian law "in the absence of some overriding domestic policy trans-

lated into law . . . ." *Norwalk Victory, supra*, 336 U.S. at 396. The claimants-appellants make a two-step argument. They assert, first, that the district court and the Canadian trial court erred in holding that under Canadian law a person may not recover purely economic losses resulting from another's negligence in the absence of physical damage to his person or property. The second contention is that even if the district court's construction of Canadian law is correct there is an "overriding domestic policy translated into law" which requires courts of this country to permit recovery in such circumstances.

A.

The district court dismissed the claims for damages suffered by shipowners whose vessels were detained. In doing so the court relied primarily on the decision of the Canadian federal trial court which had dismissed similar claims arising out of this collision. In determining to follow the Canadian court the district court discussed two Canadian decisions: *Rivtow Marine Ltd.* v. *Washington Iron Works*, [1974] S.C.R. 1189 and *Gypsum Carrier Inc.* v. *The Queen*, [1978] 1 F.C. 147, 78 D.L.R. (3d) 175. Different, though not necessarily inconsistent, results were reached in the two cases. In *Rivtow* a claimant who had suffered no physical damage was permitted to recover for economic loss. In *Gypsum Carrier* such claimants were denied recovery. It is clear from reading the opinions in the two cases, with their comprehensive surveys of Canadian and English decisions on the matter, that there is no hard and fast rule in Canada which forbids recovery for economic loss in the absence of physical damage.

In *Rivtow* the Supreme Court of Canada emphasized that the tort which caused the loss of the claimants was failure by the manufacturer and distributor of defective equipment, who knew how and where the equipment would be used, to warn the purchaser of the defects. The court found that the loss

of revenue suffered by the claimant was the immediate consequence of the breach of duty to warn. The court held that a "proximity of relationship" between the claimant and the defendants gave rise to the duty to warn and that loss of revenue was recoverable "as compensation for the direct and demonstrably foreseeable result of the breach of that duty." [1974] S.C.R. at 1215, 6 W.W.R. at 71.

The facts in *Gypsum Carrier* were similar to those in the present case. This ship damaged a railroad bridge, causing it to be closed for eight days. The claimants were railroads which had no proprietary interest in the damaged bridge, but which had contracts with the bridge owner permitting them to use it upon payment of a prescribed schedule of tolls. The railroads sued for the expense of re-routing their trains while the bridge was closed. The *Gypsum Carrier* court concluded that *Rivtow* is not properly limited to its fact situation and the particular relationship which existed there, noting that the Supreme Court of Canada has cited *Rivtow* for the broader principle that there may be recovery for pure economic loss without showing that a claimant has suffered physical injury to his person or property. Nevertheless, the *Gypsum Carrier* court concluded that the claim of the railroads was too remote to permit recovery. "The railways' economic loss was not . . . a direct and reasonably foreseeable result of the striking of the bridge by the vessel." 47 D.L.R. (3d) at 199.

It seems clear to us that the degree to which pure economic loss is recoverable under Canadian law is not free from doubt. Nevertheless, neither *Gypsum Carrier*, where the claim was similar to that of the plaintiffs in the present case, nor the decision of Justice Addy, where the facts are identical, was appealed. The district court's reliance on *Gypsum Carrier* and Justice Addy's opinion finds support in Canadian and English law. *See Star Village Tavern* v. *Nield*, [1976] 6 W.W.R. 80, 71 D.L.R. (3d) 439; *Trappa Holdings Ltd.* v. *Surrey & Imperial Paving Ltd.*, [1978] 6 W.W.R. 545; *Hunt* v. *T. W. Johnstone Co.*, [1976] 69 D.L.R. (3d) 639, 12 O.R. (2d) 623;

SCM (United Kingdom) Ltd. v. *W. J. Whittal & Son Ltd.*, [1970] 3 All E.R. 245. Judge Krupansky did not err in following the decision of Justice Addy as correctly stating the law of Canada.

B.

The claimants-appellants contend that even if Canadian law does not permit recovery for detention of vessels which suffer no physical injury, the law of the United States does permit such recovery and it should be applied. They recognize the general rule that substantive rights in a tort action are governed by the law of the place where the wrong occurred. However, they contend that a claim for loss for detention is an exception because of the existence of an "overriding domestic policy translated into law . . . ." *Norwalk Victory, supra*, 336 U.S. at 396.

In support of this assertion the claimants rely on two statutes and a number of cases. The statutes, 33 U.S.C. §§ 403 and 409,[5] clearly state a policy against obstruction of navigable waters. However, they do not deal with remedy, and the penalty provisions which follow[6] impose criminal sanctions in the form of fines and imprisonment plus revocation and suspension of the licenses of masters and pilots convicted there-

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[5] 33 U.S.C. § 403

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; * * *

33 U.S.C. § 409

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. * * *

[6] 33 U.S.C. §§ 411, 412

under. These statutes provide no proof of the existence of an overriding American policy permitting a vessel, otherwise uninjured, to recover from one whose negligence has caused delay in passage.

Many of the cases cited by the claimants are no more persuasive than the statutes. Cases which permit a party who suffers special damages, different from the inconvenience suffered by the general public, to recover against one responsible for a nuisance do not reach the question before us. In some of the cases cited, the plaintiffs either sought injunctions rather than damages or suffered direct physical injury to property from the wrongful acts of the defendants. *E.g.*, *Sinclair Refining Co.* v. *Smith*, 13 F.2d 68 (5th Cir. 1926) (recovery for direct interference with riparian rights). In *The Jamaica*, 51 F.2d 858 (W.D.N.Y. 1931), the issue in the present case was not discussed and apparently was not raised. Two relatively recent district court decisions do directly support the claimants. Both *In Re China Union Lines, Ltd.*, 285 F. Supp. 426 (S.D. Tex. 1967), and *In Re Lyra Shipping Co.*, 360 F.Supp. 1188 (E.D. La. 1973), allowed damages for detention of ships otherwise unaffected by collisions which obstructed channels. In view of other rulings to the contrary, we are unable to find that these decisions establish the existence of an overriding domestic policy.

In *Petition of Kinsman Transit Co.* (Kinsman II), 388 F.2d 821 (2d Cir. 1968), the court dealt with claims of shipowners who were unable to complete intended movements in the Buffalo River because of an obstruction which closed that waterway for two months. The claims were described by the court as follows:

> Neither the Gillies nor the Fair [ships of claimants] suffered any direct or immediate damage for which recovery is sought. The instant claims occurred only because the downed bridge made it impossible to move traffic along the river. *Id.* at 825 (footnote deleted).

In an earlier decision, *Petition for Kinsman Transit Co.* (Kinman I), 338 F.2d 708 (2d Cir. 1964), the court determined liability and permitted recovery by those who suffered "direct" consequences of the negligent conduct and whose "damage, although other and greater than expectable, is of the same general sort that was risked." *Id.* at 724. The parties permitted to recover were owners of ships and the other property physically damaged in the series of events which occurred when one defendant's ship, which was improperly secured, broke loose into the river. Nevertheless, in *Kinsman II* the court denied recovery because the injuries suffered by the detained claimants were too "remote" or "indirect" a consequence of the defendants' negligence. 388 F.2d at 821.

The requirement of *Kinsman II* that recovery for pure economic loss be limited to that which is direct and not too remote a consequence of the defendants' negligence is not unlike the test in *Rivtow Marine Ltd.* v. *Washington Iron Works*, *supra*, that the damages be "the direct and demonstrably foreseeable result of the breach of that duty." [1974] S.C.R. at —, 6 W.W.R. at 711. We conclude that there is no absolute rule either in Canada or the United States which forbids recovery for economic loss where the claimant has suffered no physical injury. Nor does a simple requirement of foreseeability provide the answer. Each nation's courts have been confronted with the task of determining the limit to which liability of a tortfeasor for consequential damages may be extended. The *Kinsman* court referred in both opinions to Judge Andrews' statement, dissenting in *Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339, 354-55, 162 N.E. 99, 104 (1928): "It is all a question of expediency, * * * of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind." *See* 338 F.2d at 725, 388 F.2d at 825. In *Gypsum Carrier, Inc.* v. *The Queen*, *supra*, 78 D.L.R. (3d) at 182, the Canadian court quoted Lord Denning, M.R., in *Spartan Steel & Alloys, Ltd.* v. *Martin &*

Co. (Contractors) Ltd., [1973] 1 Q.B. 27, 36-37, in part as follows:

> At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of *duty*, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the *damages* recoverable — saying that they are or are not, too remote — they do it as matter of policy so as to limit the liability of the defendant.

The claimants-appellants have failed to establish the existence of an overriding policy of the United States which is different from that of Canada on the question of permitting recovery for economic loss in the absence of physical injury.[7] Both countries recognize the right to recover for pure economic loss where particular relationships, *e.g.*, accountant and client, securities advisor and investor, or manufacturer aware of defect who knows of intended use by consumer, establish a clear duty whose breach leads to injury. However, in cases where there is no pre-existing or special relationship and the duty owed to the claimants is the same as that owed to the public in general, the courts have deemed it reasonable to permit recovery only by those whose damages are "direct." Though arguments can be made for the opposite conclusion, courts in both countries have determined that the damages suffered by detained vessels which are not otherwise injured are too remote or indirect to warrant recovery. Since neither Canada nor the United States has adhered to an absolute rule either permitting or denying damages under these circumstances, there was really no choice-of-laws decision to be made. We cannot say that the district court erred.

Affirmed on appeal and cross-appeal. No costs allowed.

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[7] For a comprehensive treatment of the subject in general, see F. James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 Vand. L. Rev. 43 (1972).

APPENDIX B

THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

IN THE MATTER OF THE COMPLAINT)
OF THE BETHLEHEM STEEL)
CORPORATION, ETC.)

CIVIL ACTION NO. C75-104

MEMORANDUM AND ORDER

KRUPANSKY, J.

This a maritime action wherein plaintiff, Bethlehem Steel Corporation, has asserted its statutory right, pursuant to 46 U.S.C. §§183 et seq., as amended, to a limitation of liability on claims arising from the collision of its vessel, the Steamer Steelton, with Bridge No. 12 in the course of the ship's passage through the Welland Canal of the St. Lawrence Seaway. The

maritime and admiralty jurisdiction of this Court is property invoked pursuant to 28 U.S.C. §1333.

On August 5, 1977, plaintiff filed in this Court its Motion to Dismiss All Claims, appending thereto a certified copy of the July 21, 1977 Judgment Order of Justice George Addy of the Federal Court of Canada, Trial Division, delivered in an action related to these proceedings styled Bethlehem Steel Corporation v. The St. Lawrence Seaway Authority, No. T-3418-74. Claimants herein responded in opposition to the Motion on August 16, 1977. Plaintiff thereafter filed on September 13, 1977, a Supplement to Plaintiff's Motion to Dismiss All Claims, appending thereto a certified copy of the Final Judgment Entry in the aforesaid Canadian proceeding. On

October 6, 1977, claimants filed a Supplemental Response in Opposition to Plaintiff's Motion to Dismiss Claims to which plaintiff replied on October 14, 1977. In addition, plaintiff filed on October 14, 1977 a Supplement to its Motion to Dismiss all Claims. The Court is, therefore, called upon to render a final decision respecting plaintiff's liability on the several claims filed herein. A brief review of the facts and circumstances giving rise to this action and a chronology of the judicial proceedings to date, both here and in Canada, is appropriate.

The Steamer Steelton is a Great Lakes bulk freighter owned and operated by plaintiff, a corporation duly organized and existing under the laws of the State of Delaware. On August 25,

1974, while proceeding through the Welland Canal on a voyage from Buffalo, New York to Contrecoeur, Quebec, Canada, the Steelton collided with Bridge No. 12, a vertical lift highway bridge spanning the Welland Canal, causing extensive damage to both the vessel and the bridge. As a result of this collision, which occurred wholly within the territorial boundaries of Canada, Bridge No. 12 was destroyed. The debris obstructing the Welland Canal prevented vessels from traversing the waterway at that location for several days.

On September 26, 1974, plaintiff filed an action in the Federal Court of Canada against the St. Lawrence Seaway Authority and all other persons having claims against plaintiff and the steamship Steelton requesting a limitation of liability under Canadian law. Pursuant to the Canada Shipping Act, the Federal

Court of Canada limited plaintiff's liability and ordered plaintiff to pay into that court the amount of $671,489.09 in Canadian dollars, plus interest to the date of deposit. On November 1, 1974 plaintiff deposited with that court the amount of $680,733.56 in Canadian dollars, including interest, ($691,761.44 in United States dollars).

In addition to those actions filed in the Federal Court of Canada, a number of separate actions were filed against plaintiff in this Court. Plaintiff thereafter filed in this Court a Complaint, pursuant to Rule 9(h), Fed. R. Civ. P., Rule F, Supplemental Rules for Certain Admiralty and Maritime Claims, and 46 U.S.C. §185, petitioning this Court for limitation of liability, while claiming the benefit of the lesser limitation provided by the Canada Shipping Act.

Subsequent to the filing of an ad interim stipulation for value and a surety deposit in the sum of $850,000.00, with interest, (the limit of liability under 46 U.S.C. §183) this Court issued, on February 6, 1975, a Monition ordering all persons or corporations claiming damages for any and all losses resulting from the aforesaid collision, to file their respective claims and answers with the Clerk of this Court on or before March 10, 1975, (later extended to April 11, 1975). The Court further enjoined the institution and prosecution of any and all suits, actions or legal proceedings in any court whereSoever situated, arising as a result of the aforesaid collision, except in proceedings for limitation of liability against plaintiff or against the Steelton, other than the proceedings

already commenced in the Federal Court of Canada, Trial Division, Ottawa, Canada, Case No. T-3418-74.

Pursuant thereto, a number of separate actions arising out of the Steelton collision, which were then pending before this Court, were stayed while each of the plaintiffs therein filed claims in this proceeding. The following claims, identified by the name of the claimant, the original case number (if any separate action is still pending before the Court), the nature of the claim and the amount of damages sought, remain pending in this action:

> Claim of Marriott Corporation, through its division, Sunline Agencies, and Oceanic Sunline Special Shipping Company; C74-1170; for the delay of its chartered passenger vessel Stella Maris II, in the amount of Forty-One Thousand, Three Hundred and Fifty-Six Dollars ($41,356.00).

Claim of Weyerhaeuser Company, through its division, Weyerhaeuser Line; C74-1174 for the delay of its chartered cargo vessel Pallas, in the amount of Sixty-One Thousand, Nine Hundred and Seventeen Dollars and Nineteen Cents ($61,917.19).

Claim of A/S Rederiet Odfjell; C74-1180; for the delay of its caro vessel Bow Rogn, in the amount of One Hundred Thousand Eight Hundred Forty-Eight Dollars and Thirty-Three Cents ($100,848.33).

Claim of Polski Linie Ocaniczne; C74-1196; for the delay of its cargo vessels Zawiercie, Zakopane and Zabrze, in the amount of Ninety-Two Thousand Dollars ($92,000.00).

Claim of Naviera Alcala, S.A.; C74-1197; for the delay of its chartered cargo vessel Sebastiano, in the amount of Seventy Thousand, Five Hundred Dollars ($70,500.00).

Claim of Matthew Shipping Company Limited and Matthew Ship Chartering Limited; C74-1199; for the delay of its chartered motor vessels Sissy and Jobella, in the amount of Eighty Four Thousand, Three Hundred and Fifty Dollars ($84,350.00).

Claim of I. S. Joseph Shipping Co., Ltd.; C74-1200; for the delay of its chartered cargo vessel Golfo Di Palermo, in the amount of One Hundred and Forty-Five Thousand Dollars ($145,000.00).

Claim of Manchester Lines, Inc.; C74-1201; for the delay of its chartered cargo vessels Fortuna and Manchester Mercurio, in the amount of Seventy-Five Thousand Dollars ($75,000.00).

Claim of Naviera Ceresio S.A.; C74-1202; for the delay of its motor vessel Honesty, in the amount of One Hundred Thousand Dollars ($100,000.00).

Claim of Scindia Steam Navigation, Ltd.; C74-1203; for the delay of its motor vessel Jalayaya, in the amount of One Hundred Thousand Dollars ($100,000.00).

Claim of Federal Commerce and Navigation [1974] [Ltd.]; C74-1204; for the delay of its chartered motor vessels Chertal, Elainne, Atlantic Charity, Pitria, Atlantic Hope, Federal Seaway and Marylisa, in the amount of Three Hundred Thousand Dollars ($300,000.00).

Claim of Skips A/S Westray; C74-1213; for the delay of its chartered cargo vessels Mambo and Rhumba, in the amount of Ninety-Three Thousand Dollars ($93,000.00).

Claim of Hyman-Michaels Company; C75-2; for the delay of its chartered cargo vessel Fifth Avenue, in the amount of One Hundred Thousand Dollars ($100,000.00).

Claim of Jadranska Slobodna Plovidba; C75-3; for the delay of its cargo vessel Makarska, in the amount of Forty-Five Thousand Dollars ($45,000.00).

Claim of Ocean Transport, Inc.; C75-38; for the delay of its chartered motor vessel Diakan Truth, in the amount of Sixty-Six Thousand, One Hundred and Eleven Dollars and Forty-Eight Cents ($66,111.48).

Claim of Kommanditgesellschaft Great Lakes Transcaribbean Line G.M.B.H. and Co.; C75-39; for the delay of its chartered motor vessels Faifun and Dorothea Bolten, in the amount of Eighty Thousand Dollars ($80,000.00).

Claim of Richmond Shipping Limited and Cast Shipping Limited; C75-40; for the delay of its chartered cargo vessel Atlantic Skou, in the amount of Seventy-Five Thousand Dollars ($75,000.00).

Claim of Luria Brothers & Company, Inc.; for the delay of its chartered cargo vessel Vanda, in the amount of Forty-Two Thousand Dollars ($42,000.00).

Claim of Murmansk Shipping Company; for the delay of its cargo vessels Baltijsk and Sasha Borodulin, in the amount of Twenty-Three Thousand Dollars ($23,000.00).

Claim of Black Sea Shipping Company, for the delay of its cargo vessel Donetsky Metallurgyovv, in the amount of Eighty-Eight Thousand Dollars ($88,000.00).

Claim of Kurt Orban Company, Inc.; for demurrage fees, interest and other charges resulting from the delay in the shipment of steel coils aboard the cargo vessel S. S. Aalsum, in the amount of One Hundred and Six Thousand, One Hundred and Two Dollars and Ninety-Five Cents ($106,102.95).

Claim of Parcel Tankers, Inc.; for the delay of its chartered vessel M/T Stolt Condor, in the amount of One Hundred and Eight Thousand, Two Hundred and Sixty Dollars ($108,260.00).

Upon the Motion of plaintiff, the matter was subsequently brought to a hearing before this Court to determine the applicable law governing the limitation of liability, to wit: the Law of Canada, i.e., the Canada Shipping Act, §§647, et seq., as amended, or the law of the United States, i.e., an Act of Congress of March 3, 1851, 46 U.S.C. §§183 et seq., as amended. Upon a

thorough review of the Canada Shipping Act, §§647 et seq., the pleadings and oral arguments of counsel, the testimony of the expert witnesses, together with the relevant case authority, the Court issued its Order of April 22, 1976 in which it determined the applicable law of the case. Initially, the Court adopted the settled principle that "in the absence of some overriding domestic policy translated into law, the right to recover for a tort depends upon and is measured by the law of the place where the tort occurred," the lex loci delicti commissi. Black Diamond S. S. Corporation v. Robert Stewart & Sons (Norwalk Victory), 336 U.S. 386, 396 (1949). See, Cuba Railroad Company v. Crosby, 222 U.S. 473 (1912); Slater v. Mexican National Railroad Company, 194 U.S. 120 (1904); Petition of

Chadade Steamship Co., Inc. (Yarmouth Castle), 266 F. Supp. 517 (S.D. Fla. 1967). Since the collision of the Steelton with Bridge No. 12 occurred within a Canadian waterway, it was determined that the rights and liabilities of the parties arising as a consequence of the collision are governed by law of Canada.

Further examination of the law revealed the equally settled principle that even "where the rights of the parties are grounded upon the law of jurisdictions other than the forum, . . . the forum will apply the foreign substantive law, but will follow its own rules of procedure." Bournias v. Atlantic Maritime Co., Ltd., 220 F.2d 152, 154 (2d Cir. 1955). Upon exhaustive review of the somewhat sparse legal precedent, the Court determined

that the specific limitation of liability provisions of the Canada Shipping Act were procedural in nature and that the law of the forum, i.e., 46 U.S.C. §§183 et seq., must determine the maximum limitation of the fund created in the action before this Court. Having so determined, plaintiff's surety deposit of $850,000.00, previously deposited with the Court pursuant to 46 U.S.C. §185, was not diminished to reflect the lesser monetary limit of the Canada Shipping Act.

Now, in conformity with the Court's prior ruling that the law of Canada, the lex loci delicti commissi, controls the issues of substantive law in the action before this Court, plaintiff moves the Court to dismiss all of the claims presented herein, citing in support of its Motion the July 21, 1977

Judgment Order of the Federal Court of Canada. In that order, Justice Addy disallowed the claims of the National Steel Corporation and the Wayne Soap Company. Plaintiff asserts, and Justice Addy himself observed that the claims filed by both of these claimants in the Federal Court of Canada are of the same nature as the claims pending before this Court. Upon comparison, the Court concurs in this assertion and similarly concludes that the claims filed herein must be dismissed.

Alleging damages in the amount of $243,680.20, National Steel Corporation filed a claim in the Canadian proceedings for the loss of profits from its two motor vessels, as a result of the delay caused by the collision of the Steelton with Bridge No. 12 on the Welland Canal. The Wayne Soap

Company filed a similar claim for the additional shipping costs incurred in the overland transfer of tallow, which became necessary when maritime travel was halted on the Welland Canal. Careful scrutiny of the 22 claims filed in the action before this Court reveals 21 claims for loss of profits resulting from vessel delay and one claim for additional shipping costs and interest, also resulting from vessel delay.

In his order of July 21, 1977, Justice Addy summarized at the outset the fundamental precepts of law giving rise to remedies for tortious conduct. At pages four and five of the Order, the learned trial judge stated:

> The redress of what might appear to be a real wrong will not be recognized where its enforcement would greatly impede the proper functioning of our society or, because of its intricate interrelationships, ultimately result in

greater wrongs than those for which relief is contemplated. Such problems must frequently be solved pragmatically and it matters little whether we declare that the limits which must be imposed are dictated by policy, common sense or by the more philosophically acceptable concepts of social justice or of legal theory. The important thing is that the law, in this necessarily hazy area of human relations, must lay down rules which define limits which can be recognized by all members of our society in order that they may be aware of their respective rights, duties and responsibilities and govern themselves accordingly.

In the law of torts generally, the courts, in order to formulate logically defensible basis for creating liability on the one hand and, on the other hand, for imposing limits to the responsibility for damages which might otherwise flow from a tortious act or omission, have applied to the problem of remoteness of damages three main tests. The first test is whether the alleged tortfeasor had a duty of care to the claimant; in applying this test difficulties arise in defining the nature of the duty and in establishing the class of people to whom it is owned. At times in order to restrict and at other times to enlarge

> the area of responsibility, the courts have resorted to the added tests of "foreseeability" of the nature of the damage and of causality, that is, of determining whether the damage was a direct consequence of the negligent act or whether it really resulted from some other intervening cause. The courts also at times refer to remoteness of damage as a separate test distinct from the other three. I, however, find difficulty in appreciating how, from the standpoint of legal theory, damage can be too remote if the nature of that damage is reasonably foreseeable, for it has been well established that once the nature of the damage is foreseeable it is no answer to say that its actual extent is not.

The Court recognized that where the damage incurred by a claimant is solely of the nature of an economic loss, and does not involve actual physical injury, "the general law is that such damage is not recoverable even where it might have been foreseeable and where the proper causal relationship between the tortious act

and the damage exists." Although several exceptions to the general law have arisen in Canada, Justice Addy stated his view that "the range of cases, where economic loss is not dependent upon physical damage of some sort is recoverable, remains nevertheless very limited." Bethlehem Steel Corporation v. The St. Lawrence Seaway Authority, supra at 6.

To support his conclusion that there can be no recovery for economic loss resulting from vessel delay, Justice Addy cited to the recent decision in Gypsum Carrier, Inc. v. Her Majesty the Queen, No. T-3747-71 (Federal Court of Canada May 9, 1977). A review of the facts and circumstances in that action discloses a fact pattern which is not dissimilar to that presented herein. An ocean going freighter,

the Harry Lundeberg, collided with a swing span railway bridge spanning the Fraser River near the city of New Westminster, British Columbia. As a result of the collision, all railway traffic over the bridge was suspended for a period of eight days. Three railway companies filed claims for expenses incurred as a result of traffic delay and the rerouting of railway traffic.

The trial court acknowledged the general principle that "the absence of physical damage to any property of the railway companies does not, by itself, preclude recovery for the additional expense the railway companies incurred (the economic loss)." Gypsum Carrier, Inc. v. Her Majesty the Queen, supra at 12. In reviewing the law and formulating the appropriate criteria for evaluating the liability for damages,

the court stated at 26,

> In my opinion, the test of foreseeability (including "proximity" as described by Lord Atkin) is a relevant test to apply in the case before me. But it must be combined with, or followed by, what is, I think a third approach.
>
> To my mind, economic loss, even though foreseeable, ought not to be recoverable unless it results directly from the careless act. . . .

In reaching that determination, and concluding that the railway companies could not recover for economic losses resulting from rail traffic delay, the Court referred to the following excerpts from the decision in Donoghue v. Stevenson, [1932] A.C. 562, at 581:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law is my neighbor? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation

as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctring of Heaven v. Pender, as laid down by Lord Esher (then Brett M.R.) when it is limited by the motion of proximity introduced by Lord Esher himself and A. L. Smith L. J. in Le Lievre v. Gould. Lord Esher says: "That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." So A. L. Smith L.J.: "The decision of Heaven v. Pender was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other." I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be

> bound to take care would know would be directly affected by his careless act.

In conclusion, it was held in Gypsum Carrier, Inc. v. Her Majesty the Queen, supra, that under the reasonably foreseeable and direct consequence tests "the railway companies were not persons so closely and directly affected that those having charge of the vessel ought reasonably to have had the railways in contemplation when the vessel was proceeding towards the bridge . . . . " (Id. at 33); that "the railways' economic loss was not, in my opinion, a direct and reasonably foreseeable result of the striking of the bridge by the vessel." Id at 34. Therefore, the claims for economic loss were denied.

In addition to the decision in the Gypsum Carrier case, Justice Addy relied upon another recent Canadian opinion disclosing a similar fact pattern. In

Star Village Tavern v. Nield and Ken Cook Ltd., [1976] 6 W.W.R. 80 (Hamilton, J. Man. Q.B.), a motor vehicle collided with a bridge spanning the Red River in Manitoba, Canada. The resultant damage closed the bridge for approximately one month, and the detour of all traffic increased the traveling distance from Selkirk, Manitoba to plaintiff's tavern from the normal 1-1/2 miles to 15 miles. Plaintiff brought an action against the negligent operator of the motor vehicle for the economic loss to his tavern business resulting from the reduced patronage while the bridge was in disrepair. Finding that such damages were beyond the reasonable contemplation of the misfeasant, the court stated at 83:

> [T]here must be some link between the wrongdoer and the person suffering loss. . . . [I]t appears that the test of foreseeability remains. That test confirms the limits of liability

> within reason. To abandon it places compensation at large and within the limitless discretion of the judiciary.

Finally, Justice Addy analyzed these precedents, and the cases cited therein, in light of the recent decision of the Supreme Court of Canada in Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189. This was a products liability action for damages incurred as a result of the defective design and manufacture of two pintle-type cranes installed on plaintiff's log barge, the Rivtow Carrier, for the purpose of loading logs. Defendants had both been aware for some time that the pintle-type cranes were subject to cracking due to negligent design, but neither company warned plaintiff of the potential danger and accompanying necessity for repair. Plaintiff sued for the cost of repairing the cranes and for the loss of use of

the Rivtow Carrier during the repair period. The Supreme Court of Canada approved the award of damages for economic loss, in the absence of direct physical harm, where a defendant was duty-bound to exercise reasonable care to the foreseeable plaintiff. The Court, speaking through Ritchie, J., stated at 1215:

> [I] am satisfied that in the present case there was a proximity of relationship giving rise to a duty to warn and that the damages awarded by the learned trial judge were recoverable as compensation for the direct and demonstrably foreseeable result of the breach of that duty.

Applying the foregoing legal precedents to the facts before him, Justice Addy concluded, in the particular language of the Rivtow Marine case, that there was no relationship between the claimants and the Bethlehem Steel Corporation of sufficient proximity that

gave rise to a duty to claimants. See, Bethlehem Steel Corporation v. Her Majesty the Queen, supra, at 6. The court furthermore held that there was no threat of physical harm to the property of the claimants caused by the Bethlehem Steel Corporation. Id. at 10. Having so concluded, Justice Addy disallowed the claims of both the National Steel Corporation and the Wayne Soap Company, having also determined that the latter claimant was "still further removed from the orbit of responsibility of Bethlehem Steel." Id. at 11. The judgment entry which made final the disposition of the foregoing claims and others similarly pressed in the Federal Court of Canada, was entered on August 22, 1977. Attached to the Supplement to Plaintiff's Motion to Dismiss all Claims is a Certificate of Search, wherein the Registry Officer

of the Federal Court of Canada, Trial Division certified that no appeal has been filed against the August 22, 1977 Judgment of Justice Addy as of October 3, 1977, three days after the statutory time limit for filing such an appeal.

Upon a thorough examination of the judgment order of Justice Addy, together with each of the decisions cited therein, this Court reaches the inexorable conclusion that the law of Canada, in its current posture, denies any recovery for economic losses resulting from vessel delay as presented in the instant litigation by the claims filed before this Court and the Federal Court of Canada. Indeed, in accordance with its earlier determination that the lex loci delicti commissi controls the issues of substantive law raised in this proceeding, the Court must follow

the rulings of Justice Addy as the law of Canada most directly in point (in view of the identity of the factual and legal issues presented both here and in the Canadian proceedings).

In their supplemental brief in opposition to plaintiff's Motion to Dismiss, claimants assert that the law of Canada, as applied by Justice Addy, contravenes the manifest domestic policy of the United States, citing in support of this propcsition, two district court decisions awarding damages for economic losses incurred as a result of vessel delay, viz., In Re Lyra Shipping Company, Ltd., 360 F. Supp. 1188 (E.D. La. 1973) and In Re China Union Lines, Ltd., 285 F. Supp. 426 (S.D. Tex. 1967). While the Court acknowledges these rulings, it nonetheless remains cognizant of the decision in Petition of Kinsman Transit

Company, 388 F.2d 821 (2d Cir. 1968), which, along with Palsgraf v. Long Island R. R. Co., 248 N.Y. 339, 162 N.E. 99 (1928), has become textbook tort law with respect to the doctrines of foreseeability and remoteness of damage. In Kinsman, the Court of Appeals for the Second Circuit confronted claims for economic losses resulting from the blockage of the Buffalo River after two vessels collided with the Michigan Avenue Bridge. The Court stated at 388 F.2d 824, 825:

> On the previous appeal we stated aptly: "somewhere a point will be reached when courts will agree that the link has become too tenuous -- that what is claimed to be consequence is only fortuity." 338 F.2d at 725. We believe that this point has been reached with the Cargill and Cargo Carriers claims. Neither the Gillies nor the Farr suffered any direct or immediate damage for which recovery is sought. The instant claims occurred only because the downed bridge made it impossible to move traffic

> along the river. Under all the circumstances of this case, we hold that the connection between the defendants' negligence and the claimants' damages is too tenuous and remote to permit recovery. "The law does not spread its protection so far." Holmes, J., in Robins Dry Dock, supra, 275 U.S. at 309, 48 S.Ct. at 135.
>
> In the final analysis, the circumlocution whether posed in terms of "foreseeability," "duty," "proximate cause," "remoteness," etc. seems unavoidable. As we have previously noted, 338 F.2d at 725, we return to Judge Andrews' frequently quoted statement in Palsgraf v. Long Island R. R., 248 N.Y. 339, 354-355, 162 N.E. 99, 104, 59 A.L.R. 1253 (1928) dissenting opinion): "It is all a question of expediency * * * of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind." (footnotes omitted).

Moreover, the Court cannot disregard the controlling principle of lex loci delicti commissi which the Supreme Court adopted in Black Diamond S.S. Corporation v. Robert Steward & Sons,

336 U.S. 386 (1949). Therein, at 395-396, the Supreme Court stated:

> But if it is the law of Belgium that the wrong creates no greater liability than that recognized by the Convention of 1924, we cannot, without more, regard our own statutes as expanding the right to recover. Any other conclusion would disregard the settled principle that, in the absence of some overriding domestic policy translated into law, the right to recover for a tort depends upon and is measured by the law of the place where the tort occurred. Smith v. Condry, 1 How. 28, 33, 11 L.Ed. 35; Slater v. Mexican National R. Co., 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed. 900; Cuba R. Co. v. Crosby, 222 U.S. 473, 32 S.Ct. 132, 56 L.Ed. 274, 38 L.R.A., N.S., 40; Western Union Telegraph Co. v. Brown, 234 U.S. 542, 34 S.Ct. 955, 58 L.Ed. 1457

Quite simply, plaintiff's case law references do not constitute an "overriding domestic policy translated into law." Furthermore, as stated by the Supreme Court of the United States in Cuba Railroad Company v. Crosby, 222 U.S. 473, 478 (1912):

> The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. American Banana Co. v. United Fruit Co., 213 U.S. 347, 356, 53 L.Ed. 826, 832, 29 Sup. Ct. Rep. 511, 16 A. & E. Ann. Cas. 1047. See Bean v. Morris, 221 U.S. 485, 486, 487, 55 L.Ed. 821, 823, 31 Sup. Ct. Rep. 703. That, and that alone, is the foundation of their rights.

It may be contended that there exists an overriding domestic policy for providing redress for the wrongful acts of negligent tortfeasors. It may even be asserted that the test of foreseeability, which is generally adhered to by the courts of Canada and which was applied herein by Justice Addy, itself constitutes an established precept of of tort law supporting the domestic policy of succoring the aggrieved com-

plainant. It does not follow, however, that all logical (or attenuated) extensions of a given tenet of law, or the application thereof to the myriad permutations of factual circumstances, rise to the level of domestic policy, much less to the level of domestic policy sufficient in depth and weight to override the controlling law of a foreign nation. Indeed, the doctrine of lex loci delicti commissi is itself derived from a domestic and international policy of comity and comitias gentium. To accede to complainants' argument would emasculate existing domestic and international policy and accord only salutory recognition to the overriding principle of lex loci delicti.

The court is therefore compelled to adopt the rulings of the Federal Court of Canada on the issues of sub-

stantive law presented herein, and the 22 claims filed in this proceeding for damages resulting from vessel delay, as well as the 17 individual actions previously referred to which raise the same issues confronted herein, must be dismissed under the law of Canada.

Accordingly, IT IS ORDERED that the claims of the following claimants be, and the same are hereby, dismissed with prejudice at claimants' cost:

1. Marriott Corporation, through its division, Sunline Agencies and Oceanic Sunline Special Shipping Company.

2. Weyerhaeuser Company, through its division, Weyerhaeuser Line.

3. A/S Rederiet Odfjell.

4. Polski Linie Ocaniczne.

5. Naviera Alcala, S.A.

6. Matthew Shipping Company Limited and Matthew Ship Chartering Limited.

7. I.S. Joseph Shipping Co., Ltd.

8. Manchester Lines, Inc.

9. Naviera Ceresio, S. A.

10. Scindia Steam Navigation Ltd.

11. Federal Commerce and Navigation [1974] [Ltd.]

12. Skips A/S Westray.

13. Hyman-Michaels Company.

14. Jadranska Slobodna Plovidba.

15. Ocean Transport, Inc.

16. Kommanditgesellschaft Great Lakes Transcaribbean Line G.M.B.H. and Co.

17. Richmond Shipping Limited and Cast Shipping Limited.

18. Luria Brothers & Company, Inc.

19. Murmansk Shipping Company.

20. Black Sea Shipping Company.

21. Kurt Orban Company, Inc.

22. Parcel Tankers, Inc.

In view of the foregoing resolution and disposition of all outstanding claims in this case, all pending motions to compel discovery, (to wit: 12 separate Motions

to Compel Answers to Interrogatories and 11 separate Motions for Production of Documents, all filed by plaintiff), are hereby rendered moot and are, accordingly, denied. The Complaint filed by Bethlehem Steel Corporation for the limitation of liability is also rendered moot by the dismissal of all claims filed herein, and is accordingly dismissed with prejudice at claimants' cost.

IT IS FURTHERMORE ORDERED that the following individual actions which were originally filed in this Court and subsequently stayed pending a resolution of the claims filed in the instant proceeding, are, for the same reasons herein announced, hereby dismissed with prejudice at plaintiffs' cost:

1. Sunline Agencies, et. al. v. Bethlehem Steel Corporation, C74-1170.

2. Weyerhaeuser Line, etc. v. Bethlehem Steel Corporation, C74-1174.

3. A/S Rederiet Odfjell v. Bethlehem Steel Corporation, C74-1180.

4. Polski Linie Ocaniczne v. Bethlehem Steel Corporation, C74-1196.

5. Naviera Alcala S.A. v. Bethlehem Steel Corporation, C74-1197.

6. Matthew Shipping Company Limited et. al. v. Bethlehem Steel Corporation, C74-1199.

7. I. S. Joseph Shipping Co., Ltd. v. Bethlehem Steel Corporation, C74-1200.

8. Manchester Liners, Ltd. v. Bethlehem Steel Corporation, C74-1201.

9. Naviera Ceresia, S.A. v. Bethlehem Steel Corporation, C74-1202.

10. Scindia Steam Navigation, Ltd. v. Bethlehem Steel Corporation, C74-1203.

11. Federal Commerce and Navigation [1974][Ltd.] v. Bethlehem Steel Corporation, C74-1204.

12. Skips A/S Westray v. Bethlehem Steel Corporation, C74-1213.

13. Hyman-Michaels Company v. Bethlehem Steel Corporation, C75-2.

14. Jadranska Slobodna Plovidba v. Bethlehem Steel Corporation, C75-3.

15. Ocean Transport, Inc. v. Bethlehem Steel Corporation, C75-38.

16. Kommanditgesellschaft Great Lakes Transcaribbean Line G.M.B.H. and Co. v. Bethlehem Steel Corporation, C75-39.

17. Richmond Shipping Limited, et. al. v. Bethlehem Steel Corporation, C75-40.

The foregoing individual actions shall be dismissed pursuant to Rule 58, Fed. R. Civ. P., by separate entries of final judgment which shall refer to and incorporate therein this final judgment order.

IT IS SO ORDERED.

/s/Robert B. Krupansky
United States District Judge

No. 80-1100

In the Supreme Court of the United States

October Term, 1980

MARRIOTT CORPORATION, *et al.*,
Petitioners,

vs.

BETHLEHEM STEEL CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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LIST OF SUBSIDIARIES OF BETHLEHEM STEEL CORPORATION

BETHLEHEM STEEL CORPORATION
ENTERPRISES NOT CONSOLIDATED

50% OR LESS OWNED:

- Brinco Limited
- Erie Mining Company
- Erie Mining Company, A Limited Partnership
  - Erie Development Company
- Gas & Oil Joint Ventures:
  - C & K/Bethlehem
  - Kirby/Bethlehem
  - Forest Oil/Bethlehem
- Industria e Comercio de Minerios S. A.—Icomi
  - Acos Anhanguera, S. A.
  - Amapa Florestal e Celulose—AMCEL
  - Brumasa Madeiras S. A.
  - Caemi-Cummins Motores, S. A.
  - Companhia Progresso do Amapa—Copram
  - Empreendimentos Brasileiros de Mineracao S. A. —E.B.M.
  - 41 Exploration Companies
  - 11 Forestry Companies
- Iron Ore Company of Canada
  - Carol Lake Company, Ltd.
  - Gulf Power Company
  - Hotel Montagnais, Inc.
  - Quebec North Shore and Labrador Railway Company
  - Retty Metals, Ltd.

Iron Ore Land Company
Northern Land Company, Limited
La Compagnie de Telephone Ungava
Schefferville Power Company
Twin Falls Power Corporation Limited
Labrador Telephone Co.

Itmann Coal Company

Kaycee Bentonite Partnership

Lamco Joint Venture

Mastic Inc.

Met-Mex Penoles, S. A. de C. V.
Inmobiliaria Tamrey
Penoles Metals & Chemicals, Inc.

Minera Apolo, S. R. de C. V.

Presque Isle Corporation

Restauradora de las Minas de Catorce, S. A. de C. V.

Sichon (Thailand) Limited

Societé des Mines de Fer de Mekambo, S. A. (Somifer)

Thailand Offshore Joint Venture

OVER 50% OWNERSHIP:

Bethlehem Hotel Corporation

Mahoning Ore and Steel Partnership

Nordex Joint Venture

Nubeth Joint Venture

Ontario Iron Company

Sierra Rutile Limited

Venoil Inc.

Venpet Inc.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

SUMMARY OF ARGUMENT

The decision below is in accordance with the legal principle that the right to recover for a tort depends upon and is measured by the law of the place where the tort occurred. On the same facts a Court of competent jurisdiction in Canada held that there was no right to recover for economic losses to vessels detained but not physically damaged by the obstruction of the Canadian waterway known as the Welland Canal. There is no other legal principle which governed the decision below. No question of law is at issue that justifies the grant of a Writ of Certiorari.

ARGUMENT

The legal principles which govern decision here have been well established by this court and the federal courts generally for many years. The right to recover for a tort depends upon and is measured by the law of the place where the tort occurred.

Slater v. Mexican National R. Co., 194 U.S. 120

Cuba R.R. Co. v. Crosby, 222 U.S. 473

Western Union Telegraph Co. v. Brown, 234 U.S. 542

Where maritime torts occur in foreign waters, the rights and liabilities of the parties will depend on the law of the foreign nation in whose waters the tort occurred as construed by its courts.

Smith v. Condry, 42 U.S. 28

Black Diamond S.S. Corp. v. Robert Stewart & Sons (Norwalk Victory), 336 U.S. 386 (1949)

Ishizaki Kisen Co., Ltd. v. United States, 510 F.2d 875 (9th Cir. 1975)

The court below carefully considered the controlling principle of *lex loci delicti commissi* in holding that the law of the place governed the right to recover; the accident occurred in the waters of Canada and hence the Canadian law applied.

The district court dismissed the claims for vessel detention damages relying primarily on a decision of the Canadian Federal Trial Court which dismissed similar claims for delay to American vessels of National Steel Corporation filed in the Canadian limitation action. The court below held that the decision of Justice Addy of the Federal

Court of Canada correctly stated the law of Canada (App. p. 11). This, we submit, was inescapable since no appeal was taken from Justice Addy's decision in Canada on the same facts and issues and his decision was completely supported by citations of leading Canadian cases which the courts below considered and found applicable. Consequently, it is quite clear that Canadian law does not provide any cause of action for losses due to the detention of petitioners' vessels in this case and this was the basis for the decision below.

Petitioners seek to have this case reviewed because of (1) a supposed necessity for applying an "overriding domestic policy translated into law" which requires payment of economic losses to foreign vessels detained because of the negligent but unintentional obstruction of a foreign public navigable channel and (2) an alleged conflict between decisions of Circuit Courts of Appeal. The first question was adversely decided to petitioners but the right of a time charterer to recover vessel detention damages was never decided by the court below and was not a basis for its decision. It would be more accurate to state the sole issue as follows:

Whether the Law of Canada as construed by its own courts denying any recovery for economic loss to a vessel which is detained but not physically damaged by the unintentional negligent obstruction of a public navigable waterway located within Canada is applicable and controlling on the same facts?

The petitioners seek to avoid the application of the law of Canada, where the tort occurred, that does not permit a recovery of economic loss for detention of vessels which sustained no physical injury, by contending that the law of the United States does permit such a recovery and should be applied. Although conceding the general

rule that substantive rights in a tort action are governed by the law of the place where the wrong occurred, petitioners argue that a claim of economic loss by reason of the detention of a vessel is an exception because of the existence of an "overriding domestic policy translated into law". The argument is fallacious for two reasons: (1) domestic public policy would not create such rights in a foreign jurisdiction but may determine whether rights arising under foreign law should be enforced in a domestic forum, and (2) there is no such public policy.

The petitioners have misunderstood the legal meaning of public policy and its application where it exists. In *Northern Pacific Railroad v. Babcock,* 154 U.S. 190 (1894) it was held that the right to recover and the limit of the amount of the judgment are governed by the *lex loci,* and not by the *lex fori,* and the following language contained in a Minnesota case with respect to public policy, was quoted with approval, on pages 197-198:

> " 'But it by no means follows that, because the statute of one State differs from the law of another State, therefore it would be held contrary to the policy of the laws of the latter State. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the State where made. To justify a court in refusing to enforce a right of action which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interest of our own citizens. If the State of Iowa sees fit to impose

this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens.' "

In *Curtis v. Campbell,* 76 F.2d 84 (3rd Cir. 1935) on page 85:

> "There is a marked difference between public policy—something that affects 'the morals or natural justice,' or the 'general interest of the people of the estate,' justifying refusal to enforce a foreign right of action—and mere difference in state laws with respect to a particular subject."

Petitioners are seeking to create a cause of action for vessel detention within the territory of a foreign nation where none presently exists by claiming that public policy requires it. To do so, would violate all basic concepts of our tort law and comity between nations under international law.

In *American Banana Company v. United Fruit Company,* 213 U.S. 347 (1909), on page 356:

> "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater v. Mexican National R.R. Co.,* 194 U.S. 120, 126. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."

In *Cuba R.R. Co. v. Crosby, supra,* 222 U.S. 473, 478 (1912):

> "The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. . . . That and that alone is the foundation of their rights."

Petitioners have misconstrued the effect of public policy where it exists to deny the enforcement of a right arising under foreign law in a domestic forum and do not have any basis for asserting that there is a public policy in the United States which holds that economic losses arising from vessel detention due to the negligent obstruction of a public waterway are recoverable when no physical damage has been inflicted to the vessel.

In *Petition of Kinsman Transit Company,* 388 F.2d 821 (2d Cir. 1968), a vessel broke loose from its moorings on the Buffalo River in Buffalo, New York during the winter and was carried downstream by the current. It struck a second vessel which in turn broke loose from its moorings and both vessels were carried downstream until they crashed into a bridge which collapsed and obstructed the Buffalo River, a public, federally maintained, navigable waterway. It was held that vessel and cargo owners unable to unload their cargos by conventional means due to the obstruction of the river could not recover damages in the absence of proof that the interference was intentional. On pages 824-825:

> "On the previous appeal we stated aptly: 'somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity.' 338 F.2d

at 725. We believe that this point has been reached with the Cargill and Cargo Carriers claims. Neither the Gillies nor the Farr suffered any direct or immediate damage for which recovery is sought. The instant claims occurred only because the downed bridge made it impossible to move traffic along the river. Under all the circumstances of this case, we hold that the connection between the defendants' negligence and the claimants' damages is too tenuous and remote to permit recovery. 'The law does not spread its protection so far.' Holmes, Jr., in Robins Dry Dock, supra, 275 U.S. at 309, 48 S.Ct. at 135."

The Ninth Circuit is in accord with the Second Circuit in requiring a showing that some special right has been invaded in order to recover distinguishable from others who may be adversely affected in a general way. In *Union Oil Company v. Oppen,* 501 F.2d 558 (9th Cir. 1974), commercial fishermen sued oil companies for damages to their business as a result of the Santa Barbara oil spill in 1969. The court allowed recovery to the commercial fishermen since the escaping oil caused direct injury and because of protection which has been long accorded to fishermen by the maritime law. However, the court strongly upheld the general policy of not allowing a recovery for purely economic losses, stating at 570-571:

". . . our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill of January 28, 1969. The general rule urged upon us by defendants [of no recovery for purely economic loss] has a legitimate sphere within which to operate."

The Fifth Circuit is in accord with the Second Circuit. In *Dick Meyers Towing Service, Inc. v. United States,* 577

F.2d 1023 (5th Cir. 1978) it was held that there could be no recovery for detention of the vessel caused by the negligent obstruction of a public waterway when no physical damage has been inflicted upon the vessel. The decision had the effect of nullifying the two district court decisions in that circuit upon which petitioners rely, namely, *In Re Lyra Shipping Co., Ltd.*, 360 F. Supp. 1188 (E.D. La., 1973) and *In Re China Union Lines, Ltd.*, 285 F. Supp. 426 (S.D. Tex., 1967).

In *General Foods Corporation v. United States of America, et al.*, 448 F. Supp. 111 (D. Md., 1978), the district court carefully reviewed the recoverability of economic losses as a matter of law and granted the motion of the United States to dismiss such claims. The applicable and leading cases were carefully analyzed. The court concluded that *In Re Lyra Shipping Co., Ltd., supra,* and *In Re China Union Lines, Ltd., supra,* which petitioners urge as establishing public policy, are merely two isolated cases, stating on page 116:

> "These two cases are inconsistent with the greater weight of authority, and have not been followed. Further, even these expansive cases do not impose liability which is as far reaching as that which would be imposed in the present case. The time period was very short in *In Re China*, and the number of vessels using the locks in *In Re Lyra* was finite. Imposition of liability in the present case involves precisely the limitless type of liability which courts have consistently considered excessive for negligence. Neither the case law nor the sound policy considerations on which the decisions are bottomed support the plaintiff's claims for its economic losses. Even assuming General Foods is a foreseeable plaintiff, 'the law does not spread its protection so far.' "

The contention of the petitioners that *Gartland S.S. Co. v. Elgin, Joliet and Eastern Ry. Co.*, 277 F.2d 382 (7th Cir. 1960) establishes a right to recover for vessel detention due to the negligent obstruction of a navigable public waterway without physical damage having been inflicted unto the detained vessel is incorrect. In that case the parties apparently assumed or agreed that detention damages were recoverable during the proceedings in the district court and that question was not considered nor was it raised in the appeal.

Contrary to the claims made by the petitioners, all of the federal circuit courts in which the question has been considered have ruled that vessel detention damages caused by the negligent obstruction of a navigable public waterway are not recoverable when no physical damage has been inflicted to the detained vessel for reasons which are identical to those on which the law in Canada is based. In the Memorandum and Order of the district court in this case, 449 F.Supp. 68, the July 21, 1977 judgment and order of the Federal Court of Canada, by Justice Addy, was reviewed in detail. The reasons for Justice Addy's decision were considered to be adequate and based upon decisions of the courts of Canada which furnished ample support for his conclusions. The vessel detention claims in the district court and the Federal Court of Canada were based upon the same facts. In dismissing petitioners' claims, the district court pointed out that the decision in *Petition of Kinsman Transit Company, supra,* was in harmony with the law of Canada.

There is nothing which supports petitioners' contention of a domestic policy favoring the recoverability of vessel detention damages for negligent obstruction of a public waterway in this country. A review of the decisions of the circuit courts establishes that the weight of authority is in

accord with the law of Canada in not permitting a recovery of such economic losses.

The legal effect of public policy, where it exists, has been misunderstood by the petitioners. There is no valid basis for asserting as petitioners are in this case, that public policy can be relied upon as a rule of law permitting a recovery of damages for a tort committed in a foreign territorial jurisdiction in which no such legal principle exists. As pointed out by the district court in the case at bar (App. p. 33):

> "It may be contended that there exists an overriding domestic policy for providing redress for the wrongful acts of negligent tortfeasors. It may even be asserted that the test of foreseeability, which is generally adhered to by the courts of Canada which was applied herein by Justice Addy, itself constitutes an established precept of tort law supporting the domestic policy of succoring the aggrieved complainant. It does not follow, however, that all logical (or attenuated) extensions of a given tenet of law, or the application thereof to the myriad permutations of factual circumstances, rise to the level of domestic policy, much less to the level of domestic policy sufficient in depth and weight to override the controlling law of a foreign nation. Indeed, the doctrine of *lex loci delicti commissi* is itself derived from a domestic and international policy or comity and *comitias gentium*. To accede to complainants' argument would emasculate existing domestic and international policy and accord only salutory recognition to the overriding principle of *lex loci delicti.*"

The controlling principle, we submit, is clearly set forth in *Black Diamond S.S. Corporation v. Robert Stewart & Sons*, 336 U.S. 386 (1949) at pages 395-396:

> ". . . But if it is the law of Belgium that the wrong creates no greater liability than that recognized by the Convention of 1924, we cannot, without more, regard our own statutes as expanding the right to recover. Any other conclusion would disregard the settled principle that, in the absence of some overriding domestic policy translated into law, the right to recover for a tort depends upon and is measured by the law of the place where the tort occurred. *Smith v. Condry*, 1 How. 28, 33, 11 L.Ed. 35; *Slater v. Mexican National R. Co.*, 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed 900; *Cuba R. Co. v. Crosby*, 222 U.S. 473, 32 S.Ct. 132, 56 L.Ed. 274, 38 L.R.A., N.S., 40; *Western Union Telegraph Co. v. Brown*, 234 U.S. 542, 34 S.Ct. 955, 58 L.Ed. 1457."

The application of public policy to operate solely as a restraint upon the enforcement of a foreign right in our courts is set forth in *Cuba Railroad Company v. Crosby*, 222 U.S. 473, page 478:

> "The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there."

There is no overriding domestic policy translated into law in the United States that requires the payment of vessel detention damages due to the negligent but unintentional obstruction of a public, navigable waterway which did not inflict physical damage to the vessel and certainly no such domestic public policy could be extended to apply within the territorial limits of Canada. The circuit courts which have ruled upon this question all deny recovery; *Petition of Kinsman Transit Company, supra, Dick Meyers Towing Service, Inc. v. United States, supra, Union Oil Company v. Oppen, supra,* and *Oppen v. Aetna Insurance Co.*, 485 F.2d 252 (9th Cir. 1973).

In *Capen v. Aetna Insurance Co., supra,* 485 F.2d 252 (9th Cir. 1973) also arising from the 1969 Santa Barbara oil spill, it was held that pleasure boat owners could recover for physical damage inflicted by the oil to their boats as damages recoverable for negligence, but the damage suffered on account of their loss of navigation rights in the Santa Barbara channel and harbor is no different in kind from that suffered by the public generally and is not recoverable (pages 259-260).

The decisions of the District Courts in *In Re China Union Lines, Ltd., supra,* and *In Re Lyra Shipping Co., Ltd., supra,* were overruled by the Fifth Circuit in *Dick Meyers Towing Service, Inc. v. United States, supra,* denying recovery for business losses to an operator of tug boats and other vessels due to the negligent obstruction of a public waterway.

The recoverability of vessel detention damages due to the obstruction of a waterway was not involved on appeal in *Gartland S.S. Co. v. Elgin, Joliet and Eastern Ry. Co., supra,* 277 F.2d 382 (7th Cir. 1960). The district court had ruled that the total damages arising out of the collision between a vessel and a drawbridge must be borne equally by the railroad as the owner and operator of the bridge and the vessel. Some vessel detention claims had been settled by the parties. The sole question on appeal was, on page 383:

> "The contested issue is whether the District Court's finding that the Fredborg was partially at fault for its collision with the bridge is 'clearly erroneous'."

The basis for the detention claims of vessels in the foregoing case is not disclosed by the opinion and may have arisen out of the invasion of special rights. In any event, that case does not hold that the recoverability of detention damages by a vessel is a matter of public policy.

The lack of any authority to support petitioners' claim of an overriding public policy translated into law in this country with respect to the recoverability of vessel detention damages under these circumstances is sought to be supplied by abstract generalizations concerning a variety of unrelated maritime cases which have no application in this context.

Petitioners refer to *Lauritzen v. Larsen,* 345 U.S. 571 (1953) as having a bearing on the issues. It involved a Jones Act, 46 U.S.C. § 688, suit filed in a federal district court in New York by a Danish seaman against a Danish shipowner for an injury sustained in a foreign port. It was held that the Jones Act was inapplicable because it would conflict with the law of Denmark. On page 583:

> "The solution most commonly accepted as to torts in our municipal and international law is to apply the law of the place where the acts giving rise to the liability occurred, the *lex loci delicti commissi.*"

Observing that the law of the flag applies to matters of internal discipline and to the personnel of a merchant ship because there must be some law on shipboard that cannot change at every change of waters, the court in *Lauritzen* reiterated its previous decisions in *United States v. Flores,* 289 U.S. 137, 158, and *Cunard Steamship Co. v. Mellon,* 262 U.S. 100, 123, on pages 585-586:

> "'And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. . . .'"

Lauritzen v. Larsen, supra, held that the Jones Act could not be applied under the points of contact theory because a review of the connecting factors which either maritime law or our law of conflicts regards as significant shows an overwhelming preponderance in favor of Danish law.

In *Moragne v. States Marine Lines,* 398 U.S. 375 (1970) a longshoreman had a fatal accident aboard a vessel *within the territorial waters of the State of Florida.* An action was filed by his widow as representative of his estate in a State Court of Florida to recover damages for wrongful death and for pain and suffering prior to death predicated upon negligence and unseaworthiness of the vessel. The case was removed to a Federal District Court in Florida and the unseaworthiness count was dismissed for the reason that the law of Florida did not encompass unseaworthiness as a basis of liability. This court held that there was a cause of action for wrongful death based on unseaworthiness under federal maritime law.

Sea-Land Services, Inc. v. Gaudet, Adm'rx, 414 U.S. 573 (1974) involved successive actions for injuries and wrongful death of a longshoreman who was injured aboard a vessel *within the territory of the State of Louisiana.* Prior to his death, the longshoreman had recovered damages for wage losses, pain and suffering and medical expenses. Thereafter, he died and his widow filed a wrongful death action because his death allegedly resulted from the shipboard injuries for which he had recovered earlier. It was held that the wrongful death action was maintainable and damages could be recovered by a descendant's dependents for loss of support, services, and society, as well as damages for funeral expenses.

American Export Lines, Inc. v. Alvez, 100 S. Ct. 1673 (1980) involved an injury to a longshoreman sustained

aboard ship *within the territorial waters of the State of New York.* It was held that his wife could maintain an action for damages for the loss of her husband's society under the general maritime law.

The foregoing cases which involve injury and death to longshoremen within the territorial waters of the states of this nation have no perceptible bearing upon the recoverability of vessel detention damages due to the obstruction of a waterway within the territorial limits of a foreign nation. Although the general maritime law of this nation has been largely created by the decisions of federal courts in personal injury and death cases, the legal principles developed in them were not and are not intended to apply to the obstruction of a foreign waterway.

Petitioners assert that there is a second question presented by the decision of the Court of Appeals in this case (now reported in 631 F.2d 441) which allegedly arises from conflicting decisions of the circuit courts regarding the application of the decision in *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927) with respect to the recoverability of vessel detention damages by time charterers rather than shipowners in cases arising from collisions between vessels. *We do not perceive any such question in the case at bar where the vessels did not sustain physical damage. Moreover, it was not a basis for the decision and there is actually no real conflict amongst the circuit courts upon this issue.*

In *Federal Commerce & Nav. Co. v. M/V Marathonian,* 528 F.2d 907 (2nd Cir. 1975) the time charterer lost the use of the chartered vessel due to a collision. Relying on *Robins Dry Dock & Repair Co. v. Flint, supra,* the court found that the time charterer's pecuniary losses were not recoverable. This court denied *certiorari,* 425 U.S. 975 (1976).

In *Venore Transp. Co. v. M/V Struma,* 583 F.2d 708 (4th Cir. 1978), it was held that where there was no suspension in the payment of charter hire while the vessel was out of service following a collision, the time charterer which paid the charter hire is entitled to recover what the shipowner would have been entitled to recover had the charter payments been suspended but the time charterer could not recover any lost profits. Therefore, either the shipowner or the time charterer, but not both, could claim such damages for loss of use from another vessel and its owner following a collision between two vessels. On page 710:

> "The principle of *Robins Dry Dock* is perfectly defensible, if pragmatic considerations require the foreclosure of remote damage claims. The tortfeasor, having paid the owner for its loss of use of the vessel, should not be required to pay additionally for the time charterer's loss of anticipated profits. A pragmatic approach would require that the offending vessel pay for the loss of use of the damaged vessel once, but no more. Unless the offending vessel is required to pay for the loss of use of the Oswego Liberty in this case, however, it would never be required to pay at all. The owner lost no charter hire. It could not claim a loss it had not suffered, and it did not do so. But payment for loss of use of the damaged vessel is a conventional item of recovery, and the fact that the charter party has transferred the risk of loss of use from the owner to the time charter should not extinguish the right to a recovery of a traditional item of damages. There is nothing remote about these damages; the only objection is that they were suffered by the time charterer rather than by the owner."

And continuing on page 711:

> "We do not intend, however, to suggest that the time charterer is entitled to lost profits. That kind of claim is foreclosed by *Robins Dry Dock*. The traditional item of recoverable damage is the owners claim for loss of use. . . ."

And continuing on page 711:

> "In *Robins Dry Dock*, Mr. Justice Holmes wrote broadly, as he customarily did, but there is no inconsistency in our holding and that of the Supreme Court in *Robins Dry Dock*. Nor do we enlarge in any way the type of damages which have been traditionally recoverable, nor the offending vessel's obligation of recompense. Under our holding the Stroha and her owner will pay no more than they would have if the charter had provided for a suspension of charter hire while the vessel was laid up.
>
> "Thus we conclude that either the owner or the time charterer, but not both, may claim damages for loss of use depending upon the charter's placement of the risk of loss of use."

The Fourth Circuit in *Struma* considered the award of detention damages to a time charterer for loss of use of a vessel during repairs after a collision with another vessel in the same amount as the customary loss of use which would be otherwise awarded to a shipowner as not being inconsistent with the rule in *Robins Dry Dock*. Since there is no inconsistency, there is no conflict. Awarding loss of use during detention for repairs to a vessel damaged in collision with another vessel was considered traditional and so long as the amount awarded was the same to a shipowner or time charterer, but not both,

and excluded any loss of profit, it was not considered an award of damages for negligent interference with a contract or loss of the expectancy of a profit from a business relationship.

The assertion by petitioners that the court below ignored its own decision in *National Steel Corp. v. Great Lakes Towing Co.*, 574 F.2d 339 (1978) is incorrect. A railroad bridge owned by the plaintiff steel company was damaged by defendant towing company when a ship in tow of its tugs struck the bridge. The bridge could not be used for three days while repairs were being made and it is the only means of transporting molten iron from its plant on an island to the mainland where it is processed in another portion of its plant into steel slabs. There was a loss of production while the repairs were being made. Defendant towing company contended that there was no right to recover damages because they were too remote under the opinions in *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2nd Cir. 1964) and 388 F.2d 821 (2nd Cir. 1968). The court disagreed and stated on page 343:

> "The facts of that case are far removed from the events on the Rouge River. Unlike the mishap piled upon mishap in the Kinsman case, 'an extraordinary concatenation of even more extraordinary events, not unlike the humorous and almost—beyond—all—imagination sequences depicted by the famous cartoonist Rube Goldberg.' 338 F.2d 708, 727, in this case the sequence of events was direct, immediate, and predictable. The boat struck the railroad bridge due to defendant's negligence, causing structural damage. Since transportation across the bridge was a necessary link in National Steel's production process, plaintiff lost production time during the three days required to

repair the bridge. While we agree that at some point the link between cause and effect may be 'too tenuous —that what is claimed to be consequence is only fortuity,' 338 F.2d at 725, that point was not reached in this case."

The distinction between *National Steel Corp., supra,* and this case is obvious. The railroad bridge involved was owned by National Steel Corporation and formed an indispensable transportation link between various buildings and operations in its steel-making plant. Raw material was smelted into molten iron at blast furnaces on an island and then transported in special railroad cars over its bridge across the river to the mainland where its slab mill was located. The damage to its bridge directly and proximately caused production losses because of the inability to transport the molten iron to the slab mill within its plant.

CONCLUSION

The law of Canada as construed by its own courts denies any recovery for economic losses to vessels detained but not physically damaged by the negligent obstruction of a navigable public waterway within its territory and is applicable and controlling on the same facts in the courts of the United States. The Court of Appeals did not err in its interpretation of the applicable law of Canada which was the basis of its decision. The decision below did not involve any important question of federal law which has not been, but should be, settled by this court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this court or of another

Court of Appeals on the same matter. The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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